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## **Ten Strategies for Reducing the Risk of Retaliation Claims**

### **1. Maintain an effective “no retaliation” policy.**

At a minimum, a zero tolerance stance against retaliation should be articulated in the employer's anti-discrimination and harassment policies and as part of its corporate compliance program. Employers should also consider implementing a stand-alone “no retaliation” policy.

### **2. All employees should be trained on the no retaliation policy and on the procedures for reporting complaints.**

Train all employees on the no retaliation policies. Train supervisors and managers how to respond to complaints that are brought forward by employees and how an inadequate or inappropriate response could lead to a retaliation complaint. Train supervisors and managers on the importance of thorough documentation.

### **3. Effectively manage complaint investigations.**

Employee complaints of discrimination must be treated seriously with a prompt and thorough investigation. Anyone involved in the investigation, including any employees who are interviewed, should be reminded of the no retaliation policy and advised that they must maintain strict confidentiality regarding the investigation. Information about the complaint and the investigation should be disclosed on a need to know basis only. If people don't know about the complaint or know who participated in the investigation, it will be more difficult for an employee complaining of retaliation to establish a causal connection between an employee's protected activity and any subsequent adverse action.

### **4. Apply policies consistently.**

Don't play favorites. Apply the same standards of performance and conduct across the board. If the employer lets policy violations slide for some employees but disciplines another employee for the same or less serious conduct, it opens the door to claims of disparate treatment that could support a retaliation claim.

**5. Address and document performance issues.**

Employers should evaluate employee performance on a regular basis (at least annually) and should document and address any performance problems in a prompt manner. Avoid the temptation to ignore the performance problems or to inflate performance scores. Solid documentation that an employee was not meeting performance expectations, and did not improve upon coaching, will provide the employer with a legitimate, non-retaliatory reason for taking adverse employment action.

**6. Carefully review discipline and termination decisions.**

Before executing an adverse employment action, confirm that the reasons for the action are documented and that there is objective evidence supporting the action. Confirm that the reason for the adverse employment action is not contradicted by any documentation pertaining to the employee's performance or work history (such as performance reviews, salary increases, bonus awards). If the employee recently has engaged in any legally protected activities, evaluate the facts and circumstances to ensure that there is no causal connection between the employee's activity and the adverse action.

**7. Be honest about the reason for the adverse action.**

Don't try to sugarcoat the true reason for taking action against an employee. If the employee is being discharged for poor performance, don't pretend that it was due to job elimination. If the position is refilled a short time later, the stated reason will appear to be a "pretext" for an unlawful reason.

**8. Consider bringing in a new decision maker.**

If an employee has complained about a supervisor, consider bringing in a neutral decision maker about that employee. If the employee has engaged in protected activity, ensure that any supervisory restructuring is not materially adverse to the employee and does not impact the employee's compensation, benefits, and other terms and conditions of employment.

**9. Reconsider and fix bad decisions.**

Conduct an impartial review of the adverse action and take corrective action if necessary. Prompt rescission of a prior employment action may shield an employer from liability, if not from a charge of discrimination.

**10. Be proactive! Consult with the AGO.**

If you are struggling with questions regarding an employment issue, policy, or practice, the members of the Litigation Division of the Attorney General's Office are available to provide you with consultation and advice. We are here to help you implement effective policies and practices to promote a healthy and productive work environment, which will help avoid law suits.